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No. 06-1269

IN THE
Supreme Court of the United States

UNITED STATES EX REL. CHARLOTTE BLY-MAGEE,
Petitioner,

v.

BRENDA PREMO, ET AL.,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

SUPPLEMENTAL BRIEF FOR PETITIONER

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The Solicitor General agrees with petitioner that the Ninth Circuit's interpretation of the False Claims Act's public disclosure bar, 31 U.S.C. § 3730(e)(4)(A), is "erroneous" (SG Br. 7) and that the court's construction of that provision "conflicts with the Third Circuit's decision in *Dunleavy*" (*id.*). The Solicitor General also acknowledges that the Eighth and Eleventh Circuits have adopted the same mistaken interpretation of the statute. *See id.* at 16. Finally, the Solicitor General concedes that the Third Circuit has recently indicated its continued adherence to the conflicting (and correct) interpretation. *See id.* Nevertheless, the government recommends against certiorari because the circuit conflict conceivably could resolve itself and because the district court might ultimately rule against petitioner on the merits of her claims. *See id.* at 7, 18-20.

Neither of those remote possibilities provides sufficient reason for this Court to deny certiorari. This case presents the Court with a timely opportunity to resolve a clear and sustained conflict among the courts of appeals on the proper interpretation of a jurisdictional provision of an important federal statute. And that question — whether the public disclosure bar of the False Claims Act applies to disclosures in non-federal administrative reports — is cleanly presented in this case; neither the government nor respondents have identified any threshold issue that could prevent this Court from resolving the issue in this appeal. Accordingly, the reservations offered by the Solicitor General should not deter this Court from granting review of this case to ensure the uniform, and correct, interpretation of the False Claims Act's public disclosure bar.

ARGUMENT

A. The Solicitor General Agrees That A Circuit Conflict Exists On The Question Presented

The decision below deepens a sustained conflict among the courts of appeals concerning an important question of federal statutory law. The "public disclosure" provision of the False Claims Act imposes a jurisdictional bar to actions based on allegations publicly disclosed in "a congressional, administrative, or [GAO] report, hearing, audit or investigation." 31 U.S.C. § 3730(e)(4)(A). The Ninth Circuit interpreted this provision as barring actions based on allegations disclosed in not only federal, but also *state* reports. The Eighth and Eleventh Circuits have adopted the same interpretation. *See Hays v. Hoffman*, 325 F.3d 982, 989 (8th Cir. 2003); *Battle v. Board of Regents*, 468 F.3d 755, 762 (11th Cir. 2006). The Third Circuit, however, has interpreted this provision as referring only to disclosures made in federal reports. *See United States ex rel. Dunleavy v. County of Delaware*, 123 F.3d 734, 745 (3d Cir. 1997). The government acknowledges this conflict and carefully explains why respondents are wrong to suggest that the conflict may be in the process of resolving itself. *See* SG Br. 16 ("Although the Third Circuit in more recent cases has distinguished *Dunleavy* on various grounds, *none of those decisions suggests disapproval of the Dunleavy court's construction of [§ 3730(e)(4)(A)].*") (emphasis added). Thus, the Solicitor General confirms that this case presents a clear and continuing conflict on the interpretation of a jurisdictional provision of an important federal statute. *See also* Pet. 9-15.

B. The Solicitor General Agrees That The Ninth Circuit Incorrectly Resolved The Question Presented

The decision below is incorrect. *See* Pet. 18-22. The government discusses the errors in the Ninth Circuit's interpretation of § 3730(e)(4)(A) in considerable detail, explaining that the lower court's statutory construction conflicts with the text, structure, and history of the False Claims Act's public disclosure bar. *See* SG Br. 7-15. That mistaken interpretation of the False Claims Act is now the law of the land in three federal circuits — the Eighth, Ninth, and Eleventh Circuits — as the government also acknowledges. *See id.* at 16. Thus, within those circuits, a rule of law that is (as the government admits) erroneous precludes *qui tam* relators from pursuing claims that Congress intended them to bring on the United States' behalf. As the government explains, the interpretation of the public disclosure bar that the Eighth, Ninth, and Eleventh Circuits have adopted substantially undermines the "twin goals of Section 3730(e)(4)(A) — *i.e.*, precluding *qui tam* actions when the government is already publicly looking into the relevant allegations and can prosecute its own suit, while promoting suits alleging possible fraud that the federal government is not publicly pursuing or may even be unaware of." SG Br. 13-14 (citation and internal quotation marks omitted).

C. The Solicitor General's Reservations Provide No Reason To Deny Certiorari

1. As an initial matter, the government's suggestion that the Third Circuit's post-*Dunleavy* decisions provide some reason for this Court to "await further development of the issue in the lower courts" (SG Br.

18) is unpersuasive. The circuit conflict could resolve itself without this Court's intervention only if the Third Circuit abandoned its original — and *correct* — interpretation of the public disclosure bar and adopted the *incorrect* interpretation of the Eighth, Ninth, and Eleventh Circuits. That possibility — however remote — provides no basis for denying the petition, for two reasons. First, the Third Circuit shows no signs of reversing course. As the government acknowledges (SG Br. 16), none of the Third Circuit's recent decisions interpreting the public disclosure bar has cast any doubt on *Dunleavy*, even though intervening decisions of other circuits had specifically disagreed with *Dunleavy*'s approach. *See also* Pet. 11-12. Second, this Court should not deny certiorari based on the theoretical possibility that the circuits might adopt a uniform, erroneous interpretation of a statute that (as the Department of Justice elsewhere has stated) serves as the "primary weapon to fight fraud" against the federal government. Press Release, U.S. Dep't of Justice, Justice Department Recovers Record $3.1 Billion in Fraud and False Claims in Fiscal Year 2006 (Nov. 21, 2006), *available at* http://www.usdoj.gov/opa/pr/2006/November/06_civ_783.html.

Moreover, further percolation is extraordinarily unlikely to lead the other circuits to alter their positions, and the government does not suggest that they might. The majority circuits in this conflict all arrived at their erroneous interpretations after the Third Circuit's carefully reasoned decision in *Dunleavy*. There is, therefore, no reason to believe that those three circuits will overrule prior panel

decisions to conform their interpretations to that of the Third Circuit.[1]

2. In spite of the reservations raised by the Solicitor General, this case provides an appropriate vehicle for resolving the acknowledged and important circuit conflict. Notably, the Solicitor General does not suggest that there are any potential obstacles in this case that would *preclude* this Court from deciding the cleanly presented conflict, such as a pleading defect or an issue that must logically be resolved before the Court could reach the question presented. Rather, the Solicitor General raises the possibility that petitioner may not prevail on the merits as a reason to forgo this opportunity to resolve the circuit conflict on the threshold jurisdictional issue. *See* SG Br. 18 (suggesting that "the resolution of the 'public disclosure' issue appears unlikely to affect the ultimate outcome of the case"). The government's concern about the merits is not only speculative, but also irrelevant to the cert-worthiness of the petition.

There is no valid reason to conclude that petitioner cannot prevail on the merits if she surmounts this erroneous jurisdictional bar. The government premises its concern about petitioner's likelihood of success on the merits on the district court's dismissal of some of petitioner's other claims.[2] Although that

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[1] The Solicitor General seems to believe that further percolation on the interpretation of category two might be appropriate in view of the Third Circuit's well-settled interpretation of § 3730(e)(4)(A)'s category one. But that independent issue is not raised in the present petition and is not part of the entrenched circuit conflict currently before this Court.

[2] The government also suggests, inexplicably, that petitioner's claims might also be subject to dismissal on the ground that they were based on information that had been publicly

order is now on appeal in the Ninth Circuit, the Solicitor General posits that the dismissal might augur ill for petitioner's chances of prevailing on remand. That dismissal, with respect to distinct claims, is insufficient evidence from which to draw the powerful inference the Solicitor General seeks to draw. In fact, even the Solicitor General grudgingly recognizes the possibility that "petitioner will prevail on the merits if this Court grants certiorari and holds that the suit can go forward." SG Br. 20. All petitioner seeks is the opportunity to have her day in court, which has been denied to her as a result of the Ninth Circuit's erroneous jurisdictional holding.

More fundamentally, whether petitioner will eventually prevail on the merits is irrelevant to this Court's determination of whether the Ninth Circuit correctly barred petitioner's claims by invoking § 3730(e)(4)(A)'s public disclosure bar. This Court does not — and, indeed, should not — prejudge the merits of the underlying claims in petitions raising jurisdictional issues. To be sure, this Court is generally "unlikely to grant certiorari in a case to announce a rule that *could* not alter the case's disposition." *Halbert v. Michigan*, 545 U.S. 605, 632 (2005) (emphasis added). That prudent restraint, however, is quite different from declining to resolve a clear and important conflict among the circuit courts based on pure speculation about what a lower court might do on the merits on remand. Accordingly, this Court routinely grants certiorari in cases raising important

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disclosed in her earlier lawsuits (*see* SG Br. 19 n.3), even though the Ninth Circuit has already rejected the notion that a public disclosure as to one time period can bar claims arising from a different time period (*see* Pet. App. 4a, 9a), and that issue is not currently before this Court in this case.

issues of federal law where the outcome on remand is uncertain. *See, e.g., Oregon v. Guzek*, 546 U.S. 517, 522 (2006) ("At most, Guzek has shown that state law *might*, not that it *does*, independently give him the right to introduce this evidence. We have made clear that 'a *possible* adequate and independent state ground' for a decision does not 'bar [our] reaching the federal questions' where, as here, a 'State Supreme Court quite clearly rested its [decision] solely on the Federal Constitution.'") (quoting *California v. Ramos*, 463 U.S. 992, 997 n.7 (1983)).

Indeed, basing certiorari decisions on speculations about the merits is particularly problematic in cases challenging the imposition of jurisdictional bars. Because jurisdictional issues are often resolved prior to discovery or other factual development, speculation about the outcome on remand will necessarily entail a high risk of error. In this regard, a petition raising a threshold jurisdictional issue is much like a petition challenging a dismissal for failure to state a claim. The petitioner in such a case, like the petitioner here, seeks the opportunity to present her claims to the lower court. In this posture, it seems particularly unwarranted to deny certiorari based only on speculation about how a lower court will perceive the merits on remand. Not surprisingly, therefore, when presented with an important federal jurisdictional issue requiring its resolution, this Court has granted certiorari in the face of much stronger evidence that the petitioner would not prevail on the merits on remand. *See, e.g., Sisson v. Ruby*, 497 U.S. 358 (1990) (granting review to resolve an important admiralty-jurisdiction issue even though the district court had announced that it "would deny petitioner's petition for limitation even if subject matter jurisdic-

tion existed to entertain th[e] action" (*In re Sisson*, 668 F. Supp. 1196, 1198 (N.D. Ill. 1987))).

In sum, this Court need not consider the underlying merits of petitioner's claims in granting certiorari and resolving the question presented in this case. It needs only to reverse the Ninth Circuit's jurisdictional holding that § 3730(e)(4)(A) bars petitioner's claims — a holding that the Solicitor General emphatically concludes is not only erroneous but also in conflict with the Third Circuit.

CONCLUSION

For the foregoing reasons and those stated in the petition, the petition for writ of certiorari should be granted.

Respectfully submitted,

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REPLY BRIEF

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Robert L. Stern et al., *Supreme Court Practice* (8th ed. 2002) 9

17 Charles Alan Wright et al., *Federal Practice and Procedure* (3d ed. 2007) 7

Respondents' attempts to sow confusion with their brief in opposition do not obscure these four basic points supporting a grant of certiorari in this case: (1) an entrenched and current conflict exists among the courts of appeals on the correct interpretation of the False Claims Act ("FCA"), 31 U.S.C. § 3730(e)(4)(A); (2) the issue on which the courts of appeals disagree is of overriding importance to the effective operation of the FCA; (3) the decision below embodies a final resolution of discrete FCA claims based on the application of one of the conflicting interpretations of that provision; and (4) there are no outstanding issues in the case that render it unsuitable for certiorari at this stage. Notwithstanding respondents' efforts at obfuscation, this case presents an excellent vehicle for resolving a deep and abiding disagreement among the circuits on an important issue of federal law.

I. RESPONDENTS' ATTEMPTS TO DISPARAGE THE THIRD CIRCUIT'S *DUNLEAVY* DECISION CANNOT UNDERMINE THE EXISTENCE OF A SQUARE CIRCUIT CONFLICT

A. Respondents recognize (Opp. 3-6) that the decision below conflicts with *United States ex rel. Dunleavy v. County of Delaware*, 123 F.3d 734 (3d Cir. 1997). But they attempt to dismiss the clear conflict between the Third Circuit's holding and decisions of the Eighth, Ninth, and Eleventh Circuits by suggesting (Opp. 1, 3, 6) that *Dunleavy* is a "decade old" and therefore "dated." That suggestion is baseless. *Dunleavy* is still good law within the Third Circuit. More significantly, the courts of appeals do not consider it dated or irrelevant.

On the contrary, the Ninth Circuit — explicitly acknowledging the *Hays*[1]-*Dunleavy* conflict — analyzed the Third Circuit's reasoning before disagreeing with *Dunleavy* and deepening the existing conflict. *See* Pet. App. 5a-8a. Moreover, the Third Circuit itself does not consider its ruling to be outdated. It has repeatedly and

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[1] *See Hays v. Hoffman*, 325 F.3d 982 (8th Cir. 2003).

recently reaffirmed *Dunleavy*, demonstrating that the decision not only remains valid but also is firmly embraced by the Third Circuit.

The Third Circuit first reaffirmed *Dunleavy* in *United States ex rel. Mistick PBT v. Housing Authority of Pittsburgh*, 186 F.3d 376, 383-84 (3d Cir. 1998) (Alito, J.). Although it is true that neither party directly challenged the established circuit precedent, the *Mistick* court's analysis necessarily assumed the continued validity of the *Dunleavy* rule. The opinion would have been written very differently if the panel had harbored any doubts. Far from distinguishing *Dunleavy*, as respondents claim (Opp. 7), the court cited *Dunleavy* approvingly and restated the prevailing rule: "In *Dunleavy*, we concluded that the term 'administrative' when read with the word 'report' refers only to those administrative reports that originate with the federal government." *Mistick*, 186 F.3d at 383 (internal quotation marks and citation omitted). Moreover, the court's holding — that the product of a request under the *federal* Freedom of Information Act is a report within the meaning of § 3730(e)(4)(A), *see id.* at 383-84 — comports with *Dunleavy*'s holding that only federal administrative materials can trigger the public-disclosure bar.

The Third Circuit reaffirmed its interpretation of § 3730(e)(4)(A) as recently as January 2007, a month after the decision below. Of course, there was still no direct challenge to circuit precedent, but in *United States ex rel. Atkinson v. Pennsylvania Shipbuilding Co.*, 473 F.3d 506 (3d Cir. 2007), the Third Circuit's analysis again assumed the continued validity of the *Dunleavy* rule. *See, e.g., id.* at 520 n.21 ("a state record cannot serve as a source of publicly disclosed allegations and transactions for purposes of § 3730(e)(4)(A)").[2]

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[2] *Atkinson* held that, although "non-federal administrative reports are not public disclosures" that trigger the public-disclosure bar of § 3730(e)(4)(A), when "there is an independent basis for raising the public disclosure bar, . . . the public nature of the information [such as a state public record] upon which a relator bases his claim . . . is

That very recent decision of the Third Circuit belies respondent's claim (Opp. 9) of a "progressive and ongoing trend" against petitioner's position on the merits. The Third Circuit is squarely in conflict with the Eighth, Ninth, and Eleventh Circuits, and has unquestionably reaffirmed *Dunleavy* in a manner indicating that there is no realistic prospect that the circuits will resolve this conflict on their own.

B. In addition to mistakenly questioning *Dunleavy*'s continued vitality, respondents attempt (Opp. 4-6) to disparage the Third Circuit's reasoning in that case. They characterize the *Dunleavy* decision as a "result driven opinion" rendered "without careful analysis" and "based upon speculative assumptions" that are simply "wrong." Opp. 5-6. Those criticisms completely miss the mark. Whenever this Court resolves an inter-circuit conflict, it is all but inevitable that one of the conflicting positions will be considered "wrong," but that does not mean there is no conflict warranting this Court's resolution.

Furthermore, respondents' principal critique (Opp. 4-5) — that the *Dunleavy* court misinterpreted the phrase "based upon" in § 3730(e)(4)(A) — has nothing to do with the question presented. Even assuming that the court erred in determining whether the suit was "based upon" a public disclosure, that is irrelevant to whether the court properly held that the term "administrative" in the second category of § 3730(e)(4)(A) should be interpreted in light of the federal company that it keeps. Put another way, the petition involves whether there was a "public disclosure" in the first place — not whether the suit was "based upon" that disclosure within the meaning of the statute.

Finally, respondents assert (Opp. 5-6) that *Dunleavy* willfully misinterpreted § 3730(e)(4)(A) because the court did not believe that the report at issue had been

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relevant in determining whether [the relator's] knowledge [of the fraud] is direct and independent" for purposes of the FCA's original-source exception in § 3730(e)(4)(B). 473 F.3d at 523.

sufficiently publicly disclosed. On the contrary, the Third Circuit's decision was based on the unambiguous language of the statute, which makes clear that Congress intended to bar only suits based on federal administrative reports because the term "administrative" appears between two plainly federal modifiers, congressional and GAO. *See Dunleavy*, 123 F.3d at 745.[3]

C. Respondents predict that the Third Circuit will eventually reject the *Dunleavy* rule, and suggest that such predictions somehow justify this Court's ignoring a clear four-circuit conflict on an important matter of statutory construction. *See* Opp. 8-9. But both cases on which they base their prediction — *United States ex rel. Stinson, Lyons, Gerlin & Bustamante, P.A. v. Prudential Insurance Co.*, 944 F.2d 1149 (3d Cir. 1991), and *United States ex rel. Paranich v. Sorgnard*, 396 F.3d 326 (3d Cir. 2005) — concern the interpretation of a different clause of § 3730(e)(4)(A). They are completely irrelevant to the future development of the conflict implicated in this case.

This case involves § 3730(e)(4)(A)'s *second* category, which bars FCA actions based upon public disclosure of allegations or transactions "in a congressional, administrative, or [GAO] report, hearing, audit, or investigation." In contrast, the first category — at issue in *Stinson* and *Paranich*, and referenced repeatedly by respondents (*see* Opp. 11-12, 16-17) — concerns "allegations or transactions

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[3] Respondents' suggestion (Opp. 13-14) that the statute's reference to the "Government Accounting Office" means an accounting office of *any* government is baseless; no court has adopted it, and it defies common sense. Congress's capitalization of the name makes clear that it meant the federal General Accounting Office (now called the Government Accountability Office), and courts and the compilers of the U.S. Code have had no trouble recognizing that scrivener's error for what it is. *See Mistick*, 186 F.3d at 387 ("Section 3730(e)(4)(A) does not reflect careful drafting or a precise use of language. To begin with a small example, this section refers to the General Accounting Office as the 'Government Accounting Office' and thus misnames an instrumentality that Congress has consistently viewed as its own."); 31 U.S.C. § 3730 n.2 (2000).

in a criminal, civil, or administrative hearing." While respondents unjustifiably conflate the two categories, the Third Circuit has properly recognized that they are entirely distinct. In *Mistick*, for example, the court held that disclosures under category one include *state* civil hearings but also reaffirmed the *Dunleavy* rule that category two includes only *federal* administrative reports. *See* 186 F.3d at 383, 389. That result is consistent with the textual differences between the two clauses: while the first category speaks generally of "a criminal, civil, or administrative hearing," the second category — which is at issue here — explicitly refers to *federal* (congressional and GAO) sources.

Moreover, *Stinson* and *Paranich* both predate *Atkinson*, in which the Third Circuit once again reaffirmed its view that category two includes only federal administrative reports. *See* 473 F.3d at 520 n.21. Thus, the decisions in *Stinson* and *Paranich* concerning category one in no way imply that the Third Circuit might reexamine its established position that the second category of § 3730(e)(4)(A) includes only federal administrative reports.

D. Respondents' omissions are even more telling. They essentially ignore the confusion in the lower courts that further justifies this Court's intervention. *See* Pet. 17-18. Nor do respondents make any mention of the considered position taken by the federal government in supporting the *Dunleavy* rule. *See* Pet. 13. In a brief in the Eighth Circuit, the United States emphasized that the position now taken by the Eighth, Ninth, and Eleventh Circuits is incorrect because it "undermine[s] the balance intended by Congress" between encouraging suits by relators and barring suits based on public disclosures. *See* Brief for the United States of America at 41, *Hays v. Hoffman*, 325 F.3d 982 (8th Cir. 2003) (Nos. 01-3888 & 01-3891), 2002 WL 32181440 ("*Hays* U.S. Br.").[4] Any further percolation

[4] Because the government addressed that issue as an *amicus curiae*, *see Hays* U.S. Br. at 1 n.1, the Solicitor General was required to approve the filing of the brief. *See* 28 C.F.R. § 0.20(c).

of the issue at this point merely provides a windfall to parties defrauding the United States.

II. THE CONFLICT IN THE COURTS OF APPEALS INVOLVES A MATTER OF FUNDAMENTAL IMPORTANCE TO THE EFFECTIVE OPERATION OF THE FCA

Given the extensive nature of federal-state benefit programs, the question presented is of critical importance in preserving meritorious *qui tam* suits that would otherwise be snuffed out at the jurisdictional stage on the basis of "public disclosures" not known to the federal government. *See* Pet. 23-25. Respondents have no answer, save that, if the problem is serious enough, Congress can fix it. *See* Opp. 12-14. If that argument were valid, this Court would never accept for review a case presenting a question of statutory construction. Because the question presented raises a straightforward issue of statutory interpretation, there is no reason for this Court to abstain from performing its proper judicial role of resolving conflicts among the circuits on questions of statutory interpretation. Nor do respondents point to any pending legislation before Congress — and petitioner is aware of none — that would resolve the conflict and clarify the proper construction of § 3730(e)(4)(A).

With literally tens of billions of dollars flowing from the federal to state governments each year for a wide variety of programs, it is imperative to obtain clarity on whether statements in state administrative reports are the types of "administrative . . . reports" that Congress intended to include in the public disclosure bar. Without such clarity, only certain FCA suits — claims of fraud against the United States uncovered in States outside the Eighth, Ninth, and Eleventh Circuits — will receive a hearing on the merits when the defendant shows that the allegations were previously disclosed in a state administrative report of which the federal government may have been completely unaware. *Cf. Hays* U.S. Br. at 41 ("Many state

and local reports, audits, and investigations . . . never come to the attention of federal authorities[.]").

III. PETITIONER SEEKS REVIEW OF A PART OF THE JUDGMENT THAT IS FINAL

Respondents claim (Opp. 2-3) that the petition should be denied because this case is in an interlocutory posture. But as to the claims at issue in the petition — namely, petitioner's claims of fraud from June 1997 through June 1999 — the case is *not* interlocutory. Rather, the court of appeals *affirmed* the district court's *dismissal* of those claims. *See* Pet. 8 (discussing procedural history). Thus, there will be *no* further proceedings as to those claims.

Respondents' theory seems to be that, because the Ninth Circuit remanded the claims that arose *after* the period covered by the state audit report, this Court should refrain from resolving the clear circuit conflict exacerbated by the court of appeals' affirmance of the final dismissal of the claims at issue in the petition. To be sure, it often makes sense to postpone review of a particular claim until that claim has been finally resolved by the lower courts (although it is not uncommon for this Court to review a claim that a court of appeals has remanded for further proceedings[5]). But that prudential principle has no application here because the claims at issue have been finally resolved.

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[5] *See, e.g., Garcetti v. Ceballos*, 126 S. Ct. 1951, 1956-57 (2006) (granting certiorari after court of appeals reversed district court's grant of summary judgment and remanded for further proceedings); *Domino's Pizza, Inc. v. McDonald*, 546 U.S. 470, 474 (2006) (granting certiorari after court of appeals reversed district court's dismissal for failure to state a claim and remanded for further proceedings); *United States v. Olson*, 546 U.S. 43, 45 (2005) (granting certiorari after court of appeals reversed dismissal and remanded for further proceedings); *see also* 17 Charles Alan Wright et al., *Federal Practice and Procedure* § 4036, at 36-37 (3d ed. 2007) ("In a wide range of cases, certiorari has been granted after a court of appeals has disposed of an appeal from a final judgment on terms that require further action in the district court, so that there is no longer any final judgment.").

Moreover, postponing a decision on the issues before this Court will not simplify matters; it can only complicate them. If this Court waits for the district court to resolve the unrelated remanded claims, it would not make the issues here any easier to resolve. The Court would have to undertake precisely the same statutory analysis of whether "administrative" in § 3730(e)(4)(A) encompasses state reports. But postponing review might burden the issues that are now cleanly presented by introducing extraneous issues that could complicate the resolution of the circuit conflict. And, if this Court subsequently reversed the decision below, a second trial on the merits would be necessary. The preservation of judicial resources, in both this Court and the district court, counsels for the immediate resolution of the question presented.

IV. NO ALTERNATIVE GROUND SUPPORTS THE JUDGMENT BELOW

Respondents claim (Opp. 14-15) that this Court's review is unwarranted because an alternative basis supports the Ninth Circuit's decision — namely, that § 3730 bars the case because it is based upon allegations publicly disclosed in one of petitioner's prior suits. Although the allegations in that prior suit covered only a portion of petitioner's current claims (those involving the time period before June 1997, *see* Pet. App. 3a-4a), the district court nevertheless held that they provided a basis for dismissing *all* of petitioner's claims. *See id.* at 17a-18a. But the Ninth Circuit *rejected* that contention. *See id.* at 4a, 9a (refusing to rely on the prior suit to bar claims involving fraud occurring after June 1997).[6] Thus, there is no risk that the Ninth Circuit will reinstate the district court's judgment if this Court grants review and reverses.

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[6] *See also Bly-Magee v. Lungren*, No. 05-55968, 2006 WL 3699494, at *1 (9th Cir. Dec. 13, 2006) (holding that the facts underlying the portion of *Bly-Magee II* that covered October 1992 through June 1997 could not have been publicly disclosed by *Bly-Magee I* because the fraudulent events had not yet taken place).

Moreover, respondents' theory is not properly before this Court because respondents failed to file a cross-petition. It is well-settled that a respondent cannot raise an alternative ground for affirmance when the effect of the Court's adopting that argument would be to invalidate a portion of the judgment on which the petitioner prevailed, regardless of whether the respondent specifically requests that relief. *E.g.*, *Strunk v. United States*, 412 U.S. 434, 435-37 (1973); *see* Robert L. Stern et al., *Supreme Court Practice* 445-46 (8th ed. 2002) (citing cases). Here, accepting respondents' contention that the prior suit bars this entire case would require reversal of the court of appeals' decision to remand for further proceedings petitioner's claims involving fraud occurring after June 1999 (*see* Pet. App. 9a). Thus, because respondents failed to file a cross-petition, their contention is not properly before this Court.

In any event, respondents' theory is incorrect. Respondents assert that, although petitioner's current claims involve false claims that occurred *after* the time period involved in her prior suit, even a "partial disclosure" can bar an entire suit. Nothing in the text of § 3730 supports that counter-intuitive proposition. *Cf. Rockwell Int'l Corp. v. United States*, 127 S. Ct. 1397, 1410 (2007) ("'[t]he plaintiff's decision to join all of his or her claims in a single lawsuit . . . should not result in the dismissal of claims that would have otherwise survived'") (quoting *United States ex rel. Merena v. SmithKline Beecham Corp.*, 205 F.3d 97, 102 (3d Cir. 2000) (Alito, J.)) (first alteration in *Rockwell*). And none of the cases cited by respondents holds that the bar applies when the alleged fraud occurred *after* the time period covered by the public disclosure.[7]

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[7] *See United States ex rel. Reagan v. East Tex. Med. Ctr. Reg'l Healthcare Sys.*, 384 F.3d 168, 176 (5th Cir. 2004) (nothing indicated that the relator's allegations regarded false claims that occurred after the public disclosure took place through the state-court lawsuit); *United States ex rel. Biddle v. Board of Trustees*, 161 F.3d 533, 535

Finally, respondents contend (Opp. 14-18) that the decision below is correct, but in so doing offer no analysis of why "administrative" should be construed to include state reports, when the references on either side of that word — "congressional" and "[GAO]" — clearly refer to *federal* sources. *See* Pet. 18-22. Although the existence of an entrenched circuit conflict is a sufficient basis for this Court to grant certiorari (and briefing on the merits can proceed after certiorari is granted), it is noteworthy that respondents offer no legal support for the Ninth Circuit's judgment.

CONCLUSION

For the foregoing reasons and those stated in the petition, the petition for writ of certiorari should be granted.

(9th Cir. 1998) (nothing indicated that relator's allegations covered a time period after public disclosure occurred through the news media); *United States ex rel. Fine v. M-K Ferguson Co.*, 99 F.3d 1538, 1546 (10th Cir. 1996) (holding that "based upon" meant "supported by" rather than "derived from"; no allegations of false claims that postdated the public disclosure); *United States ex rel. Precision Co. v. Koch Indus., Inc.*, 971 F.2d 548, 553-54 (10th Cir. 1992) (public disclosure occurred in three previous lawsuits, congressional hearings, and news reports; nothing indicated that relator alleged false claims occurring after the time period covered by all the public disclosures).

Respectfully submitted,

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